93-595

NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1993

MARVIN ANTHONY POINTER, a/k/a Ant,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court erred to the material prejudice of the petitioner by employing a preponderance of the evidence standard in its determination of the reliability of hearsay evidence which enhanced Petitioner's offense level from 28 to 43.

2. Whether the United States District Court erred to the material prejudice of the Petitioner by enhancing his sentence based on evidence which did not have a

sufficient indicia of reliability thereby denying the Petitioner his Sixth Amendment Right to Confront Witnesses against him.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARVIN ANTHONY POINTER,

Petitioner,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United

States Court of Appeals for the Fourth Circuit was rendered on July 16, 1993, as an unpublished opinion, and it appears in the Appendix at A-1. The order of the United States District Court sentencing petitioner to life imprisonment on Count I of the indictment (set out below) and 480 months confinement on Count XXX (set out below), to run concurrently with the life sentence imposed as to Count I, and a period of five and four years of concurrent supervised release (respectively, as to the

aforementioned counts), and the imposition of a special assessment totalling $100 for counts I and XXX, was rendered on September 13, 1991. The order of the United States District Court denying petitioner's Motion for a Judgment of Acquittal, pursuant to Rule 29, Federal Rules of Criminal Procedure, and denying petitioner's motion for a new trial, pursuant to Rule 33, Federal Rules of Criminal Procedure, was rendered on August 7, 1991. On May 13, 1991 through May 20, 1991, petitioner was

tried with a jury before the United States District court for the Eastern District of Virginia, the Honorable Walter E. Hoffman, District Judge (later replaced, pursuant to Rule 25 (b), Federal Rules of Criminal Procedure, by the Honorable J. Calvitt Clarke), upon his plea of not guilty to an indictment charging, in Count I, conspiracy to distribute in excess of five kilograms of cocaine, and in excess of one kilogram of heroin in violation of 21 U.S. Code Section

846, and in counts XV and XXX with possession with intent to distribute heroin in violation of 21 U.S. Code Section 841 (a) (1). On May 20, 1991, the jury returned a verdict of guilty on Counts I and XXX.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit decided this case on January 7, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

1. Amendment VI to the United States Constitution is set forth in the appendix at A-37.

2. Title 21 U.S.C. § 846 is set forth in the Appendix at A-39.

3. Title 21 U.S.C. § 841 (a)(1) is set forth in the Appendix at A-40.

4. United States Sentencing Guidelines, Section 6A1.3 is set forth in the Appendix at A-42.

5. United States Sentencing Guidelines, Section 2D1.1 (c)d(8) is set forth in the Appendix at A-45.

STATEMENT OF THE CASE

This case comes before the United States Supreme Court on petition for a Writ of Certiorari from a decision of the United States Court of Appeals for the Fourth Circuit affirming the convictions and sentence handed down by the United States District Court for the Eastern District of Virginia, Norfolk Division, the Honorable Walter E. Hoffman, District Judge, later replaced, pursuant to Rule 25(6) Federal Rules of Criminal

Procedure, by the Honorable J. Calvitt Clarke, Jr., Senior United States district Judge, presiding. Petitioner originally had come before the District Court below under a criminal indictment charging him and numerous others with various violations of Federal law concerning the distribution of heroin and cocaine. Petitioner was specifically charged with conspiracy to distribute heroine and cocaine in violation of Title 21 U.S.C. § 846 and separately in counts XV and XXX

with possession with intent to distribute heroine in violation of 21 U.S. Code §841 (a)(1). On May 20, 1991, the jury returned a verdict of guilty on counts I and XXX. Petitioner moved the Court for a Judgment of Acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure, as to Counts I and XXX of the indictment, or, in the alternative, for a new trial, pursuant to Rule 33, Federal Rules of Criminal Procedure. By Order entered August 7, 1991, both motions

were denied. On September 13, 1991, after preparation and presentation of a presentence report, petitioner was sentenced to life imprisonment on Count I and 480 months confinement on Count XXX to run concurrently with the life sentence imposed as to Count I, and a period of 5 years suspended release as to Count I and a concurrent period of 4 years suspended release as to Count XXX. Additionally, the Court imposed a special assessment of $100 for

Counts I and XXX.

Count I of the indictment charged that on or about January 1, 1984, until the time of the indictment in September, 1990, petitioner conspired with numerous others to possess with intent to distribute and to distribute in excess of 5 kilograms of cocaine, in excess of 50 grams of crack cocaine, and in excess of 175 grams of heroin. Count XXX of the indictment charged petitioner with possession of heroin with the intent to

distribute.

At trial, Gary Weathers, Wendell Jones and Tyrone Wallace testified about the petitioner's involvement in drug transactions. All three testified pursuant to plea agreements which provided for their cooperation with the government. Regarding amounts of heroin attributed to the petitioner, Wallace testified that on two occasions in 1987 and 1988, he and petitioner bought heroin from Gary Weathers. They both received 200

gram packages on each occasion, for a total of 400 grams. Wendell Jones testified that in 1986, on three occasions, petitioner gave 200 pills, each of 10 grams, to Weathers to give to a third party. Weathers testified that on two occasions, once in 1988 and once in 1989, he gave petitioner a total of 2 oz. of heroin or 56.7 grams. Weathers also testified that in 1989, he gave the petitioner two capsules of heroin (.2 of a gram) to test. These transactions total 516.9 grams. This

amount of heroin would give petitioner a base offense level of 28. U.S.S.G. § 2D1.1(c)(8).

Regarding petitioner's knowledge of the scope of the conspiracy and his role in it, Weathers testified that petitioner was a long time friend, and gambling associate, but that Weathers was an independent actor conducting separate, unrelated transactions. The government elicited no other relevant testimony regarding petitioner's knowledge and role.

Upon a finding of guilt, a presentence report was prepared, which established petitioner's offense level at 43. He was assigned responsibility for all drugs distributed in the conspiracy, he was found to have possessed and to have employed a dangerous weapon in furtherance of the conspiracy, and he was found to have managerial responsibilities within the conspiracy.

Petitioner objected to paragraphs 41, 42 and 50 of the

presentence report which established the offense level described in the above paragraph.

At sentencing, the government produced a single witness who testified to the issues set forth in paragraphs 41, 42 and 50. The witness, Special Agent James A. Waters, testified that the source of the information in the three paragraphs came from evidence introduced during the two trials that were held upon the indictment, the first, involving -other named

defendants, held in November of 1990, the second being the trial of the petitioner, and from his conversations with informants, and a review of the reports of other law enforcement agents. Waters related trial testimony indicating that petitioner was a close personal friend of Gary Weathers, that Weathers had given Petitioner small quantities of heroin, that Wendell Jones and Tyrone Wallace testified that Petitioner accompanied Weathers a few times when Weathers sold

heroin to them, and that once petitioner delivered heroin on behalf of Weathers.

Additional information came from out of court interviews with Gary Weathers, Marvin Wright, Tyrone Wallace, Clinton Faulcon and Windell Jones, all convicted felons, cooperating in hopes that the government would make a substantial assistance motion at their sentencing, or for other leniency.

Special Agent Waters also relayed to the court the substance

of other officers' official notes (DEA-6's, FBI 302's, and official documents of the Department of Alcohol, Tobacco and Firearms) of interviews with named and unnamed informants. The additional information was offered in support of the government's position in Paragraphs 41, 42 and 50, that petitioner could have reasonably foreseen the entire amount of drugs involved in the conspiracy, that petitioner played a managerial role in the conspiracy, and that pursuant

to the conspiracy, he received one gun, and, at another time, shot and wounded a member of the conspiracy.

After consideration of the hearsay evidence presented by the government in support of paragraphs 41, 42 and 50, the trial court found by a preponderance of the evidence that the allegations in paragraphs 41, 42 and 50 accurately described petitioner's actions and role within the conspiracy.

REASONS FOR GRANTING THE WRIT

QUESTION ONE

The Court erred in not applying a clear and convincing standard when it assessed the reliability of the hearsay evidence it relied upon to dramatically increase petitioner's offense level from 28 to 43.

It is generally held throughout the Circuits that a preponderance of the evidence standard of proof for sentencing factors under the

Guidelines satisfies due process. U.S. v. Urrego-Lianares 879 F2d 1234 (4th Cir., 1989), United States v. Schuster 948 F2d 313 (7th Cir., 1991).

However, one Circuit has held that a clear and convincing standard is appropriate when the relevant conduct offered at sentencing would dramatically increase the sentence. United States v. Kikumura, 918 F 2d 1084 (3rd Cir., 1990).

Kikumura involved a vast departure from the median of an

applicable guideline range. Yu Kikumura was convicted of several explosives and passport offenses for which the Federal sentencing guidelines prescribed a sentencing range of between 27 and 33 months in prison. Evidence at sentencing, however, indicated that Kikumura was involved in a massive terrorist plot. He was sentenced to 30 years, an increase of approximately 27 years. The Court held that the preponderance standard was "generally constitutional", but if

the magnitude of a contemplated departure is sufficiently great that the sentencing hearing can fairly be characterized as a "tail which wags the dog of the substantive offense" (quoting McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L. Ed. 2d 67 (1986)), then the factfinding underlying that departure must be established at least by clear and convincing evidence." (Kikumura, supra, at 1101).

At least three other Circuits

have spoken approvingly of the Kikumura rationale. U.S. v. Townley, 729 F 2d. 365 8th Cir., 1991), U.S. v. Restreppo, 946 F 2d 654 (9th Cir. 1991), U.S. v. Schuster, supra, and U.S. v. Trujillo, 959 F 2d 1377 (7th Cir. 1992).

This rationale is not accepted in the Fourth Circuit, which adheres in the aforementioned preponderance of the evidence standard for all cases. Urrego-Lianares, supra.

In the instant case, the

government presented trial testimony linking the petitioner to a small amount of drugs and a life long relationship with their star witness. That evidence was sufficient to trigger only a 66 to 108 month sentence. At sentencing, Special Agent Waters' interviews with the governments' star witness, Weathers, and other conspirators, and F.B.I., D.E.A. and A.T.F. reports of interviews with named and unnamed informants, acted as a ratchet to increase the petitioner's

punishment to life imprisonment. The Court employed a preponderance standard to achieve that result. The Court, in approving a Kikumura like departure, should have employed the Kikumura standard and judged the evidence by a clear and convincing standard.

The disparity between this Fourth Circuit decision upholding the District Court's employment of the preponderance standard, "District courts use a preponderance standard in making factual findings

at sentencing," (quoting Urrego-Lianares, supra) is in conflict with those decisions of the Third Circuit, Eighth and Ninth Circuit applying the Kikumura rational. The writ of certiorari should be granted to resolve this conflict.

QUESTION TWO

The Court erred when it enhanced Petitioner's sentence based on evidence which did not have a sufficient indicia of reliability, thereby denying him his 6th

Amendment right to confront the witnesses against him.

The Fourth Circuit's unpublished opinion holding that the District Court did not commit clear error is contrary to decisions of other United States Circuit Courts.

At trial, the government offered evidence that the Petitioner personally handled 516.9 grams of heroin, that he was a close personal friend of Gary Weathers, the government's star witness, and

little else. At sentencing, Petitioner objected to characterizations that he was aware of, or could reasonably foresee, the entire scope of the conspiracy, that he played a managerial role in it, and that he possessed and used firearms in furtherance of it, allegations contained in paragraphs 41, 42 and 50 of the presentence report. The government attempted to prove those allegations through Special Agent James Waters' knowledge of hearsay statements and

other reports gathered in the course of the investigation.

Hearsay is admissible at sentencing as long as there are certain "indicia of reliability supporting the truthfulness of the hearsay statements". U.S. v Fortier 911 F.2d 100 (8th Cir. 1990) "And if the hearsay statement is not within any well recognized exception to the hearsay exclusion, evidence...is admissible...if the statement bears particularized guarantees of trustworthiness."

Fortier, supra, citing Ohio v Roberts, 448 U.S. 56, 65 L.Ed.2d 597, 100 S.Ct. 2531 1980.

At sentencing, Agent Waters testified to hearsay interviews, both his and others, with Gary Weathers, Marvin Wright, Tyrone Wallace, Clinton Faulcon, and Windell Jones as to Petitioner's knowledge of the scope of this conspiracy and his role in it. All of the interviewees were convicted felons subject to the "coercive atmosphere" and the "motive to

fabricate" described by the 4th Circuit in its cursory opinion. However, the court never required the government to make any showing of reliability other than that the interviews were recorded on official government documents, as if that somehow made the "coercive atmosphere" and "motive to fabricate" go away:

> THE COURT: I think so far that this witness has testified what his own 302's show and what other

> investigators or other FBI Agents' 302s show. So far I think it is sufficient...This shows reliability to accept the testimony that you have given so far.

Similarly, in their effort to tie the Petitioner to firearms, the government offered hearsay that petitioner received some weapons. That information was contained in a report prepared by the Alcohol, Tobacco and Firearms Department.

Again, nothing was offered in substantiation of the hearsay's reliability except that it was recorded on a government document.

The evidence presented by the government at sentencing was available at trial, where it could have been tested in the crucible of cross-examination. The Fourth Circuit Court of Appeals in its unpublished opinion said that

> Here, where the debriefing statements were just a part of the

> governments evidence rather than its most vital underpinning, we cannot say that the district court committed clear error by considering them to complete the full picture of the conspiracy.

The district court employed the hearsay at sentencing to do much more than "complete the full picture of the conspiracy" In fact, insofar as the hearsay at sentencing was in

conflict with testimony at trial (for example, Weathers detailed description, in his debrief, of Petitioner's long involvement with the conspiracy, as contrasted with his testimony at trial that he gave Petitioner drugs on two occasions in 1988 and 1989, and that he and the Petitioner shared an interest in gambling), both courts implicitly found the hearsay more reliable than the trial testimony. When faced with the prospect of crediting two different versions of evidence, one

under oath, one presented in a setting where the one giving testimony has every "motive to fabricate", the court must adopt the testimony presented under oath. This implicit finding sentenced the petitioner to life in prison. Without this view of the evidence, petitioner would have been sentenced to only 66 to 108 months. The hearsay was not "just a part" of the government's case, it was the government's case. By failing to put the government to the minor

proof required to show "an indicia of reliability," both the District Court and the Court of Appeals violated the clear remonstrance that echoes throughout all the Circuits and is specifically found in the Sentencing Guidelines (U.S.S.G. Section 6A1.3) that hearsay must satisfy a "sufficient indicia of reliability" before it may be offered at sentencing. Fortier, supra.

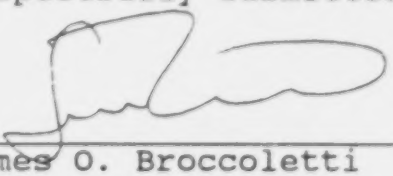
This Writ of Certiorari should be granted to redress this clear

error of both the District Court and the Fourth Circuit Court of Appeals.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,



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October 12, 1993

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. NO. 91-5160

MARVIN ANTHONY POINTER, a/k/a ANT,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. NO. 91-5164

TYRONE LOVELL STATON, a/k/a

T Bone, a/k/a Bone,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk, J. Calvitt Clarke, Jr., Senior District Judge.

(CR-90-108-N)

Argued: April 1, 1993

Decided: January 7, 1993

Before POWELL, Associate Justice (Retired), United States Supreme Court, sitting by designation, and HALL and NEIMEYER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: James O. Broccoletti, ZOBY & BROCCOLETTI, Norfolk, Virginia, for Appellant Pointer, Joseph Barry McCracken, COOK & MCCRACKEN, Norfolk, Virginia, for Appellant Staton. Leslie Bonner McClendon, Special United States Attorney, Alexandria, Virginia, for Appellee. ON BRIEF: William M. McKee, ZOBY &

BROCCOLETTI, Norfolk, Virginia, for Appellant Pointer. Richard Cullen, United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Marvin Pointer and Tyrone Staton appeal their convictions and sentences for heroin possession and

conspiracy to distribute cocaine and heroin. We affirm.

I.

On September 27, 1990, appellants Marvin Pointer and Tyrone Staton were charged, along with twelve others, with conspiracy to distribute heroin and cocaine from January 1, 1984, to the date of the indictment. The 38-count indictment also charged various substantive offenses, of which two accused Pointer and one involved Staton.

Six of the fourteen defendants

pled guilty. Five others were convicted following a jury trial in December, 1990. At the time of this trial, Staton, Pointer, and another defendant, Robert Watson, were fugitives. They were later apprehended and were tried together before a jury in May, 1991.

The government's key witness was Gary Weathers, the leading figure in the conspiracy. Weathers recounted that he began dealing cocaine in 1984 and expanded his business into heroin in 1985. He

identified Staton as one of his original sources of drugs. Between Staton and two other sources, Weathers received 200-300 capsules of heroin twice a week for approximately one year. Over his entire drug dealing career (1984-1989), Weathers estimated that he received either cocaine or heroin two times per week.

Weathers also testified generally about drug dealing; how the drugs were packaged, what cocaine and heroin cost, how the

drugs were diluted with cutting agents, and how the quality of the drugs was tested. He explained that he and his confederates used beepers and cellular telephones to keep in contact. He identified photographs of himself with various conspirators, including Pointer and Staton, and of automobiles owned by himself and Staton. He reported one instance of giving Pointer drugs to test.

The government had tapped Weathers' cellular telephone lines

from May to July, 1989, and tapes of the conversations were played for the jury. Though the district court did not permit Weathers to "interpret" any particular discussion, Weathers did define the code words commonly used. "Unc" or "uncle" was a supplier in New York. Quantities of drugs were referred to as "shoe sizes." A "barrel" was a compressed form of heroin, and cocaine was "lady," "girl," or "the other side." "Bomb" described a high-quality drug. According to

Weathers, all of the taped conversations revolved around drugs.

Weathers testified that Staton went to New York to purchase heroin for him two or three times during 1988; Weathers gave Staton $15,000 on each of the occasions. Weathers stated that he discussed drugs on the phone with Pointer during 1989, and he provided Pointer with heroin on several occasions during 1988 and 1989.

Finally, Weathers testified about helping to set up Staton in a

"reverse sting." On March 13, 1990, while in custody, Weathers called Staton and asked him to help sell a package of heroin. Staton agreed. Weathers instructed Staton to meet Darren Brown (a conspirator who had by then pled guilty) at Morrison's Cafeteria in Norfolk, Virginia.

Weathers packaged some flour in a manner that Staton would believe it was heroin. A host of law enforcement personnel took up surveillance positions at the cafeteria. Staton entered the

parking lot of the cafeteria at 2 p.m. Brown entered soon thereafter. Brown walked up to Staton's car and spoke to Staton for about a minute. Staton drove off on Interstate 264 toward downtown Norfolk. Some of the officers conducting the surveillance tried to follow, but Staton managed to elude them after a high-speed chase. Portsmouth city officers later apprehended Staton, though the flour packaged as heroin was never found, and no one witnessed it actually changing hands

at the cafeteria.

A Virginia state inmate, Wendell Jones, testified that he received heroin from Weathers over a nine-month period in 1986. On three or four of those occasions, Pointer was with Weathers, and sometimes Pointer would hand the drug to Weathers before the sale.

Tyrone Wallace, also a convicted conspirator, testified that he dealt heroin that he received from Weathers between 1987 and 1980. Wallace stated that he

saw Pcinter receive packages just like the ones he obtained from Weathers on at least two occasions.

At the close of the government's case, the district court granted a judgment of acquittal on one substantive count against Pointer and on all charges against Watson. The court denied judgment of acquittal on the conspiracy count and remaining substantive counts (one each) against staton and Pointer. The defendants presented no evidence,

and the case was submitted to the jury.

The jury convicted both Pointer and Staton of conspiracy. Pointer was convicted of possession of heroin with intent to deliver on or about July 19, 1989, and Staton was convicted of attempted possession of heroin with intent to distribute on the date of the "reverse sting" at the cafeteria.

Pointer was sentenced to life in prison for the conspiracy count and a concurrent 480 months for the

substantive count. Staton received concurrent sentences of 360 months for each conviction.

Pointer and Staton appeal.

II.

Both defendants challenge the sufficiency of the evidence to support their convictions. The evidence is sufficient if any reasonable trier of fact could have found that the elements of the crime had been established beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

A.

The evidence was sufficient to support Staton's attempted possession of heroin conviction. A culpable "attempt" is the intent to commit a crime and a "substantial step" toward its commission strongly corroborative of that intent, although "mere preparation" is not a "substantial step." United States v. McLamb, 985 F.2d 1284, 1292 (4th Cir. 1993); United States v. Sutton, 961 F.2d 476, 478 (4th Cir.) cert. denied, 113 S.Ct. 171 (1992). Here,

the government proved Staton's intent through Weathers' testimony about setting up the delivery of the flour disguised as heroin and more generally through the considerable evidence of Staton's involvement in heroin trafficking. Staton's arrival at the appointed hour, conversation with the appointed person, and high-speed getaway combine to constitute a "substantial step" strongly corroborative of his intent to possess heroin.

B.

Pointer's substantive conviction - possession of heroin with intent to distribute on or about July 19, 1989, is supported by Weathers' testimony that he supplied heroin to Pointer during 1988 and 1989 and taped phone calls between Weathers and Pointer. Weathers stated that these phone calls involved drugs, and a reasonable trier of fact could have so interpreted them. On July 19, 1989, Pointer told Weathers, "I got the, uhm, I supposed to see you. I might

have somethin, some, tonight." After he told Weathers that the customer wanted "$500 worth," Weathers responded, "Of what you had? Of what you got yesterday?"

On July 25, Pointer asked Weathers if he had "one them things." Weather said, "I ain't, ain't no more." After discussing the "damn police" and how the "shit" was "moving too slow," Pointer counted his blessings: "A pound a day ain't bad."

A reasonable jury could have

found beyond a reasonable doubt that Pointer possessed heroin with intent to distribute on or about July 19, 1989.

C.

Both defendants claim that the evidence showed the existence of many small conspiracies, but not the single large conspiracy charged. They do not question the propriety of the jury instructions; indeed, the court gave instructions proposed by the defendants. In this circuit, "(i)f the jury is properly

instructed, the finding of a single conspiracy must stand unless the evidence, taken in light most favorable to the government, would not allow the jury to so find." United States v. Urbanik, 801 F.2d 692, 695 (4th Cir. 1986).

The evidence was sufficient here. The entire conspiracy may not have been the most tightly organized in the annals of crime, but, then again, drug rings rarely adopt bylaws or blood oaths. In any event, Weathers did orchestrate

heroin and cocaine distribution for over five years, and both defendants played their roles on cue. The phone logs, taken as a whole, show an intimate familiarity between Weathers and each of the defendants and a preoccupation with discussion of drug dealings. However weak the gravity may have been on the outer fringes of the organization, Staton and Pointer were near or at its nucleus.

We affirm the convictions.

III.

At sentencing, both defendants' "relevant conduct" was found to include 35.5 kilograms of heroin and 39 kilograms of cocaine, resulting in a base offense level of 38. These drug quantities were an estimate of the total amount of drugs distributed by this long-term conspiracy. On the conspiracy charge, each was given a three-level enhancement for "manager/supervisor" role. Finally, Pointer was assessed two more levels for possession of a gun in relation to the conspiracy.

Pointer's final offense level 43 led to a life sentence, while Staton's level 41 earned him thirty years. District courts use a preponderance of the evidence standard in making factual findings at sentencing. United States v. Urrego-Linares, 879 F.2d 1234, 1238 (4th Cir.) cert. denied, 493 U.S. 943 (1989), and we review those findings for clear error. United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989).

At the sentencings, the government's witness was DEA agent

Waters. Waters summarized two types of information: (i) testimony at the prior trial of five of the conspirators, and (ii) statements made by conspirators in debriefings. Waters' testimony was thus all hearsay. Neither Staton nor Pointer offered any evidence in rebuttal.

Though evidence received at sentencing need not be strictly admissible under the rules of evidence, it must have at least "sufficient indicia of reliability to ensure its probable accuracy."

Urrego-Lianares, 879 F.2d at 1237 (quoting U.S.S.G. 21 6A1.3). As for the prior trial testimony, we see no reliability problem, inasmuch as the testimony was made under oath subject to cross-examination by persons with the same motive to discredit the witness as had Pointer and Staton. The debriefing statements are arguably less reliable, because of the potentially coercive atmosphere, motive to fabricate, and absence of cross-examination. On the other hand, the

district court is in a better position than we to decide how much weight to assign various pieces of evidence. Here, where the debriefing statements were just a part of the government's evidence rather than its most vital underpinning, we cannot say that the district court committed clear error by considering them to complete the full picture of the conspiracy.

Finally, we must note that the defendants countered no item of proof with competing evidence.

Instead, they rely solely on their argument that the government's evidence was too weak to stand on its own. Though this strategy is sometimes a good one at trial, where the government's burden of proof is rigorous, it is a risky strategy at sentencing. Left unrebutted, "reliable" hearsay, corroborated and fleshed out by less-reliable hearsay, is a preponderance of the evidence.

The evidence presented through Waters showed that Staton was

involved in the conspiracy for five years, that the conspiracy consisted of over a dozen persons, that he acted as a liaison/courier who obtained large quantities of heroin for the conspiracy in New York which he brought back to the Portsmouth area for subdivision, and that he distributed drugs to street dealers. From this information, the district court's findings that the entire amount of drugs distributed by the conspiracy was "reasonably foreseeable" from the standpoint of

Staton's criminal undertaking and that he had a "manager/supervisor" role in the offense were not clearly erroneous.

Pointer was likewise involved in the conspiracy for its entire duration. Four conspirators described him as Weathers' top lieutenant. At Weathers' direction, he received and distributed drugs, tested their quality, and collected debts. The role in the offense and relevant conduct (drug weight) findings for Pointer are not clearly

erroneous.

Pointer's firearm enhancement resulted from his having shot and injured Marvin Wright over a drug debt. Wright brought charges against Pointer, but then refused to testify after he received a threatening phone call. Weathers and another conspirator, Tyrone Wallace, witnessed the shooting and corroborated Wright's original charge.

The district Court's findings at sentencing are not clearly

erroneous.

We affirm the convictions and sentences.

AFFIRMED

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

NO. 91-5160
CR-90-108-N

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARVIN ANTHONY POINTER, a/k/a Ant

Defendant - Appellant

NO. 91-5164
CR-90-108-N

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TYRONNE LOVELL STATON, aka
T Bone, a/k/a Bone

Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Virginia at Norfolk

This case was heard by the Court on the record from the District Court and was argued by counsel.

The Court affirmed the judgment of the District Court.

/s/ Bert M. Montague

CLERK

Filed: July 16, 1993

APPENDIX C

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX D

21 UNITED STATES CODE SECTION 846

Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Pub.L. 91-513, Title II, § 407, Oct. 27, 1990, 84 Stat. 1265.)

APPENDIX E

21 UNITED STATES CODE

SECTION 841 (A)(1)

Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute,

or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

APPENDIX F

UNITED STATES SENTENCING

GUIDELINES SECTION 6A1.3

RESOLUTION OF DISPUTED FACTORS

(Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the

sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors, in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a

reasonable opportunity for the submission of oral or written objections before imposition of sentence.

APPENDIX G

UNITED STATES SENTENCING

GUIDELINES SECTION 2d1.1(C)(8)

At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 28

Supreme Court, U.S.
FILED
NOV 24 1993
OFFICE OF THE CLERK

No. 93-595

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARVIN ANTHONY POINTER, A/K/A ANT,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a sentencing court may determine the reliability of hearsay evidence under the preponderance of the evidence standard.

2. Whether the district court correctly considered hearsay evidence at petitioner's sentencing hearing.

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In the Supreme Court of the United States

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No. 93-595

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A33, is unpublished, but the judgment is noted at 998 F.2d 1011 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1993. The petition for a writ of certiorari was filed on October 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to distribute controlled substances (21 U.S.C. 846) and possessing heroin with the intent to distribute it (21 U.S.C. 841(a)(1)).[1] The district court sentenced him to a term of life imprisonment on the conspiracy count and a concurrent term of 480 months' imprisonment on the substantive count, to be followed by a five-year period of supervised release if petitioner is ever released. The court of appeals affirmed.[2]

1. Gary Weathers was the key figure in a drug distribution conspiracy that was in existence from January 1984 to September 1990.[3] Weathers began selling cocaine in 1984 and expanded his business into heroin in 1985. Petitioner's co-defendant, Tyrone Staton, was one of Weathers' original drug sources. From Staton and two other sources, Weathers received 200-300 capsules of heroin twice a week for approximately one year. Over his entire drug dealing career, from 1984 to 1989, Weathers received either cocaine or heroin on an average of twice a week. Pet. App. A5-A7; Gov't C.A. Br. 7.

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[1] The original indictment in petitioner's case had charged 14 defendants in 38 counts. By the time of petitioner's trial, six of his co-conspirators had pleaded guilty to various drug offenses, and five other co-conspirators had been convicted of drug offenses at a jury trial. Gov't C.A. Br. 2-3.

[2] Petitioner's co-defendant, Tyrone Staton, was convicted of conspiring to distribute controlled substances and attempting to possess heroin with the intent to distribute it; he was sentenced to a term of 360 months' imprisonment. Gov't C.A. Br. 2, 4-6. The court of appeals affirmed Staton's convictions and sentence. Pet. App. A1-A33.

[3] Weathers testified for the government at petitioner's trial pursuant to a plea agreement. Pet. App. A6; Gov't C.A. Br. 7.

Weathers distributed heroin to Wendell Jones over a nine-month period in 1986.[4] On several occasions, petitioner was with Weathers during drug sales, and petitioner would sometimes hand the drugs to Weathers before the sale. Tyrone Wallace received heroin from Weathers for distribution between 1987 and 1989, and on at least two occasions he saw petitioner receive packages similar to the packages of heroin Wallace was receiving from Weathers. Pet. App. A13-A14; Gov't C.A. Br. 18-19.[5]

In 1988, Staton went to New York on two or three occasions to purchase heroin for Weathers. Each time, Weathers gave Staton $15,000. Weathers discussed drugs on the telephone with petitioner during 1989, and provided petitioner with heroin on several occasions in 1988 and 1989. Pet. App. A10; Gov't C.A. Br. 11-12, 16-17.[6]

2. At sentencing, the district court estimated the total amount of drugs distributed by the Weathers-led conspiracy. The court found that the relevant conduct of petitioner and Staton included 35.5 kilograms of heroin and 39 kilograms of cocaine. Both petitioner and Staton were given three-level enhancements for their roles as managers and supervisors in the conspiracy; petitioner received an additional two-level enhancement for possessing a gun in relation to the conspiracy. On the basis of petitioner's total offense level of 43, the district court sentenced him to life imprisonment. Staton, whose total

[4] Jones, a state prisoner in Virginia, testified for the government at petitioner's trial. Gov't C.A. Br. 18.

[5] Wallace testified for the government at petitioner's trial pursuant to a plea agreement. Gov't C.A. Br. 3 n.1.

[6] The government intercepted Weathers' cellular telephone conversations from May 1989 to July 1989. Recordings of the conversations were played for the jury at petitioner's trial. All of the conversations with petitioner and Staton involved coded discussions of drugs. Pet. App. A8-A10; Gov't C.A. Br. 9-11, 13, 16-18.

offense level was 41, received a sentence of 360 months' imprisonment. Pet. App. A24-A25; Gov't C.A. Br. 23-24, 30-31.

The government's only witness at sentencing was FBI Special Agent James Watters, the case agent, who summarized testimony given at petitioner's trial and at a prior trial of five of petitioner's co-conspirators, as well as statements made by co-conspirators, including Weathers, Jones, and Wallace, at their debriefings.[7] Petitioner offered no evidence in rebuttal; Staton offered only a single affidavit related to the credibility of Weathers. Pet. App. A25-A26; Gov't C.A. Br. 19, 30; Pet. 17, 19.

3. The court of appeals affirmed. Pet. App. A1-A33. The court rejected the claims of petitioner and Staton that they had been sentenced on the basis of unreliable information. *Id.* at A24-A33. The court found no reliability problem with the prior testimony recounted by Watters, because that testimony had been given under oath and subjected to cross-examination by persons with the same motives to discredit the witnesses that petitioner and Staton had. *Id.* at A27. Although the court conceded that the debriefing statements were arguably less reliable, it concluded that, in light of the fact that the debriefing statements were not the core of the government's evidence at sentencing, the district court had not committed clear error in using them to fill out its picture of the conspiracy. *Id.* at A27-A28.

The court of appeals pointed out that petitioner and Staton had pursued the "risky strategy at sentencing" of

[7] After petitioner's trial but prior to sentencing, the judge who had presided at the trial became disabled and a second judge was assigned to conduct petitioner's sentencing. The second judge had not been present at either of the trials involving petitioner and his co-conspirators. Gov't C.A. Br. 5 n.3, 19.

making no effort to rebut the government's hearsay evidence. "Left unrebutted," the court said, " 'reliable' hearsay, corroborated and fleshed out by less-reliable hearsay, is a preponderance of the evidence." Pet. App. A29. Reviewing the evidence presented at sentencing, the court found that the district court did not commit clear error when it determined the relevant conduct and roles in the offense of petitioner and Staton, and enhanced petitioner's sentence for firearms possession. *Id.* at A28-A33.

ARGUMENT

1. Petitioner initially contends that because the district court's consideration of hearsay evidence at sentencing led to a dramatic increase in his sentence, the district court should have assessed the reliability of that evidence under the clear and convincing evidence standard, rather than the preponderance of the evidence standard. Pet. 22-29. That argument is foreclosed by *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). In *McMillan*, this Court "ha[d] little difficulty concluding that * * * the preponderance [of the evidence] standard satisfies due process" as applied to sentencing proceedings. *Id.* at 91. In accordance with *McMillan*, every court of appeals to consider the issue has held that the preponderance of the evidence standard is sufficient for making the various factual findings underlying routine sentencing determinations.[8] The court of appeals in this

[8] See, *e.g.*, *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.), cert. denied, 113 S. Ct. 287 (1992); *United States* v. *Blanco*, 888 F.2d 907, 909 (1st Cir. 1989); *United States* v. *Guerra*, 888 F.2d 247, 250-251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *Frierson*, 945 F.2d 650, 652 (3d Cir. 1991), cert. denied, 112 S. Ct. 1515 (1992); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S.

case correctly reached the same conclusion. Pet. App. A25, A32-A33.

As petitioner points out, Pet. 23, the Third Circuit in *United States* v. *Kikumura*, 918 F.2d 1084 (1990), departed from the rule that sentencing findings may always be based on a preponderance of the evidence. In *Kikumura*, the sentencing court departed upward from the Guidelines sentence of 27-33 months' imprisonment to impose a sentence of 30 years' imprisonment. That twelve-fold increase was based on the court's finding that the defendant's offense of conviction was part of a larger, uncharged scheme to commit terrorist acts. *Id.* at 1098-1102; Pet. 23-24. The Third Circuit held that, in light of the exceptional magnitude of the departure, the facts underlying the departure had to be proved by clear and convincing evidence. That heightened standard was necessary, in the court of appeals' view, to prevent the departure from becoming the "tail which wags the dog of the substantive offense." *Id.* at 1101 (quoting *McMillan*, 477 U.S. at 88).

Kikumura has not been followed by any other circuit,[9] and the Third Circuit itself has made clear that

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943 (1989); *United States* v. *Casto*, 889 F.2d 562, 569-570 (5th Cir. 1989), cert. denied, 493 U.S. 1092 (1990); *United States* v. *Carroll*, 893 F.2d 1502, 1506 (6th Cir. 1990); *United States* v. *Masters*, 978 F.2d 281, 286-287 (7th Cir. 1992), cert. denied, 113 S. Ct. 2333 (1993); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Payne*, 940 F.2d 286, 292 (8th Cir.), cert. denied, 112 S. Ct. 616 (1991) and 112 S. Ct. 1589 (1992); *United States* v. *Joetzki*, 952 F.2d 1090, 1096 (9th Cir. 1991); *United States* v. *Frederick*, 897 F.2d 490, 491-493 (10th Cir.), cert. denied, 498 U.S. 863 (1990); *United States* v. *Ignancio Munio*, 909 F.2d 436, 439 (11th Cir. 1990), cert. denied, 499 U.S. 938 (1991); *United States* v. *Alston*, 895 F.2d 1362, 1372-1373 (11th Cir. 1990).

[9] The Fifth, Seventh, Eighth, and Ninth Circuits have reserved the question whether they would follow *Kikumura* in an

Kikumura applies only in extraordinary situations. See, *e.g.*, *United States* v. *Miele*, 989 F.2d 659, 663 n.3 (1993). In particular, subsequent to *Kikumura* the Third Circuit has held that sentencing courts should use the preponderance of the evidence standard in determining the applicability of specific offense characteristics and adjustments under the Guidelines. See *United States* v. *Badaracco*, 954 F.2d 928, 935 (3d Cir. 1992); *United States* v. *Frierson*, 945 F.2d 651, 652 (3d Cir. 1991), cert. denied, 112 S. Ct. 1515 (1992); *United States* v. *Reyes*, 930 F.2d 310, 315 (3d Cir. 1991). The sentencing enhancement in the instant case arises not from an upward departure (as in *Kikumura*), but from adjustments for relevant conduct (as in *Frierson*), role in the offense (as in *Reyes*), and possession of a firearm during the offense. Furthermore, petitioner has conceded, see Pet. C.A. Br. 45, that he handled at least 516.9 grams of heroin during the conspiracy. That amount alone would result in a base offense level of 28. Sentencing Guidelines § 2D1.1, Table. The district court's ten-level adjustment for petitioner's relevant conduct (which resulted in an offense level of 38) was thus less than half of the 22-level

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exceptional case. See *United States* v. *Billingsley*, 978 F.2d 861, 865-866 (5th Cir. 1992), cert. denied, 113 S. Ct. 1661 (1993); *United States* v. *Trujillo*, 959 F.2d 1377, 1382 (7th Cir.), cert. denied, 113 S. Ct. 277 (1992); *United States* v. *Restrepo*, 946 F.2d 654, 661 & n.12 (9th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Harrison-Philpot*, 978 F.2d 1520, 1523-1524 (9th Cir. 1992), cert. denied, 113 S. Ct. 2392 (1993); *United States* v. *Townley*, 929 F.2d 365, 369-370 (8th Cir. 1991). The courts in *Trujillo*, *Restrepo*, and *Townley* applied the preponderance standard, as have other panels in the Fifth, Seventh, Eighth, and Ninth Circuits. See, *e.g.*, *United States* v. *Masters*, 978 F.2d at 287; *United States* v. *Joetzki*, 952 F.2d at 1096; *United States* v. *Payne*, 940 F.2d at 292; *United States* v. *Casto*, 889 F.2d at 569-570.

increase in the base offense level in *Kikumura*. Accordingly, *Kikumura* is not apposite.

2. Petitioner also contends that the district court erred by basing its enhancement of his sentence on hearsay evidence that lacked sufficient indicia of reliability, and thus deprived him of his rights under the Confrontation Clause of the Sixth Amendment. Pet. 29-41. That fact-specific contention does not warrant this Court's review. In any event, the court of appeals correctly concluded that the information relied on by the district court was sufficiently reliable to be considered at petitioner's sentencing. Pet. App. A26-A28.

It is well settled that at sentencing a district court has wide discretion to determine what information to consider and what weight to give it. As this Court has explained, a sentencing judge may "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). The Federal Rules of Evidence are expressly made inapplicable to sentencing hearings. Fed. R. Evid. 1101(d)(3). Moreover, under the Sentencing Reform Act of 1984, 18 U.S.C. 3551-3742 and 28 U.S.C. 991-998, all reliable evidence is admissible at sentencing. The Act specifically provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. 3661. Under the former version of Section 3661, as Congress was aware, S. Rep. No. 307, 97th Cong., 1st Sess. 1219-1220 (1981), the courts had consistently held that even illegally obtained evidence and hearsay (if reliable) could be considered at sentencing. See *Roberts* v. *United States*, 445 U.S. 552, 556 (1980); *United States* v.

Reme, 738 F.2d 1156, 1167 (11th Cir. 1984), cert. denied, 471 U.S. 1104 (1985); *United States* v. *Lee*, 540 F.2d 1205, 1210-1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976).[10]

The Sentencing Guidelines embrace those principles. Section 6A1.3 of the Guidelines provides that a district court can consider any reliable evidence, including hearsay, at sentencing. Sentencing Guidelines § 6A1.3 (Policy Statement).[11] If there is a question about the reliability of the information available to the court, the Sentencing Guidelines endorse the practice of conducting an evidentiary hearing to resolve that question. *Ibid.* See *United States* v. *Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980). But once the reliability of that information has been established, the court may use it to determine the appropriate punishment. *United States* v. *Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989); *United States* v. *Sciarrino*, 884 F.2d 95, 97 (3d Cir.), cert. denied, 493 U.S. 997 (1989); see *United States* v. *Roberts*, 881 F.2d 95, 105-106 (4th Cir. 1989).

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[10] In determining the appropriate sentence for a particular defendant, the sentencing judge may even consider evidence of crimes for which that defendant has not been convicted. *Williams* v. *New York*, 337 U.S. 241, 244 (1949).

[11] Section 6A1.3 (Policy Statement) of the Sentencing Guidelines provides that:

> (a) * * * In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

The accompanying Commentary expressly states that "[r]eliable hearsay evidence may be considered." Sentencing Guidelines § 6A1.3, Commentary.

Petitioner bases his claim on the Confrontation Clause, but every court of appeals that has considered the issue has held that the Confrontation Clause does not apply at sentencing. See *United States* v. *Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992); *United States* v. *Kikumura*, 918 F.2d 1084, 1102-1103 (3d Cir. 1990); *United States* v. *Johnson*, 935 F.2d 47, 50 (4th Cir.), cert. denied, 112 S. Ct. 609 (1991); *United States* v. *Marshall*, 910 F.2d 1241, 1244 (5th Cir. 1990), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Silverman*, 976 F.2d 1502, 1514 (6th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1595 (1993); *United States* v. *Wise*, 976 F.2d 393, 401 (8th Cir. 1992) (en banc), cert. denied, 113 S. Ct. 1592 (1993); *United States* v. *Beaulieu*, 893 F.2d 1177, 1180 (10th Cir.), cert. denied, 497 U.S. 1038 (1990).[12] It is thus clear that consideration of Agent Watters' hearsay testimony in this case did not, standing alone, violate petitioner's rights under the Confrontation Clause.

To be sure, a court may not rely on "misinformation of [a] constitutional magnitude" at sentencing. *United States* v. *Tucker*, 404 U.S. at 447. There was, however, no such reliance in the present case. Because the sentencing judge was not present at either of the trials involving petitioner and his co-conspirators, he reasonably relied on the testimony of Agent Watters to ascertain the facts presented at those trials[13] or otherwise developed in the course of the investigation of the conspiracy.[14]

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[12] In addition, three other circuits have held that the Due Process Clause does not require confrontation at sentencing. See *United States* v. *Carmona*, 873 F.2d 569, 574 (2d Cir. 1989); *United States* v. *Notrangelo*, 909 F.2d 363, 365-366 (9th Cir. 1990); *United States* v. *Giltner*, 889 F.2d 1004, 1008 (11th Cir. 1989).

[13] While it was hearsay as to petitioner, the testimony at the two trials had substantial guarantees of reliability, because it was given under oath and was subject to cross-examination by a party with

According to Watters, petitioner worked with Weathers from 1984 to 1989; Weathers gave petitioner drugs to deliver to clients; Weathers asked petitioner to collect drug debts for him; and petitioner traveled for Weathers in order to arrange drug transactions. Gov't C.A. Br. 20. Weathers told Watters that petitioner "was his closest and most trusted of all his friends, and he was the only friend with whom he could discuss all of his business; how he did it, his business philosophy," and was "a close friend with whom he would share profit, he would give money, he would give trust, and rely on [petitioner] to conduct the business that he needed to be done." *Ibid.*; see *id.* at 49.

Watters said that witnesses at the prior trial of five of petitioner's co-conspirators had testified that petitioner was very closely associated with Weathers and an integral part of everything Weathers did. Gov't C.A. Br. 21. In addition, informants had told Watters that petitioner was Weathers' "first lieutenant," that petitioner picked up heroin for Weathers on a regular basis in 1985, that in late 1987 petitioner was one of three men making heroin runs to New York three to four times a week for Weathers, and that in May or June 1988 petitioner would deliver drugs for Weathers and collect money for him. *Id.* at 21-23, 46.[15]

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interests and motives similar to those of petitioner. See, *e.g.*, Fed. R. Evid. 804(b)(1) (hearsay exception for former testimony).

[14] The debriefing information recounted by Agent Watters had its own indicia of reliability. The information had been recorded at or near the time the statements were made to the agents on standard DEA 6 and FBI 302 (Notes of Interview) forms, and had been corroborated by trial testimony and the taped conversations played at trial. Gov't C.A. Br. 43-44.

[15] Petitioner's 12 recorded telephone conversations with Weathers and other co-conspirators, which were played at peti-

Watters further testified that according to one Marvin Lee Wright, petitioner shot Wright over a drug debt, and that two other witnesses had confirmed Wright's account of the shooting. Watters advised the sentencing court that another informant had told agents of the Bureau of Alcohol, Tobacco and Firearms that the informant had purchased 17 firearms for petitioner and another drug dealer. Although Watters could not determine how many of the guns petitioner actually received, the relevant BATF report stated that the guns had been purchased to be used by petitioner's street dealers for protection against robberies and to be taken to New York to be traded for drugs. Watters estimated that the total amount of drugs distributed by the conspiracy between 1984 and 1989 was 39 kilograms of cocaine and 35.5 kilograms of heroin. He further estimated that petitioner had personally distributed 516.9 grams of heroin in the course of the conspiracy. Gov't C.A. Br. 21-23, 48-49.

On the basis of Watters' testimony, the district court found that petitioner was one of Weathers' top lieutenants, that Watters' estimate of the drugs distributed by the conspiracy was conservative, and that petitioner could reasonably foresee the amount of drugs distributed by the conspiracy. In addition, the district court adopted the recommendation in the presentence investigation report that petitioner's offense level be enhanced by three levels for his managerial role in the offense, and by two levels for his possession of a firearm during the offense. Gov't C.A. Br. 23-24.

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tioner's trial, corroborated the trial testimony and the informant information by revealing petitioner's intimate familiarity with the members of the conspiracy and the manner in which drugs were obtained and distributed. See Gov't C.A. Br. 46.

In light of this record, the court of appeals correctly ruled that the district court did not commit clear error when it considered Watters' account of the prior trial testimony and the corroborated debriefing statements "to complete the full picture of the conspiracy." Pet. App. A28. Accordingly, because Watters' testimony did not constitute "misinformation of [a] constitutional magnitude," *Tucker*, 404 U.S. at 447, due process requirements were satisfied. See *United States* v. *Sciarrino*, 884 F.2d at 97; *United States* v. *Sunrhodes*, 831 F.2d 1537, 1542 (10th Cir. 1987). Review by this Court is not warranted.[16]

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[16] Petitioner claims, see Pet. 40, that the decision below is in conflict with decisions of other courts of appeals, but he cites only *United States* v. *Fortier*, 911 F.2d 100 (8th Cir. 1990), overruled on other grounds, *United States* v. *Wise*, 976 F.2d 393, 401 (8th Cir. 1992), cert. denied, 113 S. Ct. 1592 (1993), to support that assertion. In *Fortier*, however, where the court reversed a sentence based on contested and unverified information in the defendant's presentence report, the court merely applied the same standards governing the admission of hearsay at sentencing that the court below applied. See 911 F.2d at 103-104. Accordingly, *Fortier* does not present a conflict requiring this Court's review.

Petitioner's companion argument, see Pet. 39, that the district court was required to credit Weathers' testimony at petitioner's trial over any debriefing statement he may have made, is likewise without merit. As the court of appeals correctly pointed out, Pet. App. A27-A28, the district court was in a better position "to decide how much weight to assign to various pieces of evidence."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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